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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-191

The VILLAGE OF BELLE TERRE, an incorporated municipality, JAMES PHILBIN, Mayor of the Village of Belle Terre, ROBERT DOERR, Deputy Mayor and Trustee of the Village of Belle Terre, VINCENT BOVE, Trustee of the Village of Belle Terre, VINCENT KARWOWSKI, Trustee of the Village of Belle Terre, and FRANCIS STOLZ, Trustee of the Village of Belle Terre,

Defendants-Appellants,

—against—

BRUCE BORAAS, ANNE PARISH, MICHAEL TRUMAN, EDWIN DICKMAN and JUDITH DICKMAN,

Plaintiffs-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

Opinions and Orders Below

The opinion of the Court of Appeals for the Second Circuit (JS 1a-50a),* together with two opinions issued upon denial of rehearing *en banc,* is reported at 476 F.2d 806.

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* Hereinafter, references to "JS" are to the Jurisdictional Statement. References to "A" are to the joint appendix.

The original opinion of the District Court for the Eastern District of New York (JS 51a-80a) has not been officially reported. The District Court order issued on remand, pursuant to the above-mentioned decision of the Court of Appeals, appears at JS 83a. The Court of Appeals order (JS 81a) affirming this District Court order is the judgment from which the instant appeal was taken.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(2). The final judgment of the Court of Appeals was filed May 1, 1973. Notice of Appeal (JS 86a) was filed with the Court of Appeals, May 17, 1973. The appeal was docketed by the filing of a jurisdictional statement July 27, 1973, and this Court noted probable jurisdiction October 15, 1973.

Question Presented

Whether the Building Zone Ordinance of the Village of Belle Terre, insofar as it proscribes residence by more than two persons who are not related by blood, adoption or marriage, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Statement of the Case

At issue in this suit is the constitutionality of a zoning ordinance of the incorporated Village of Belle Terre, New York, which prohibits groups of more than two (2) unrelated persons, as distinguished from traditional families

consisting of any number of persons related by blood, adoption or marriage, from occupying a residence within the Village of Belle Terre, which is zoned entirely for "one family" occupancy.

Appellees Edwin and Judith Dickman own a house in the suburban municipality of Belle Terre which is located in Suffolk County, New York. At the time this suit was commenced, Appellees Boraas, Parish and Truman were tenants of the Dickmans. They lived in the Dickman house along with three other persons. All six tenants were students at the State University at Stony Brook, which is approximately a fifteen minute drive from Belle Terre. The leasehold arrangement between the Dickmans and the students was to expire on May 31, 1973, but was extended beyond that date (JS 52a-53a).*

None of the student occupants of the Dickman house was related to any of the others by blood, adoption or marriage. Under the living arrangement they evolved, each occupied a single bedroom and paid a portion of the rent. The six were organized and functioned as a single housekeeping unit insofar as they used the common kitchen facilities, dined together and shared housekeeping, "yard" chores, and a "house" checking account from which disbursements for necessary household expenses were made (JS 32a). It is conceded that all of the occupants behaved in a responsible manner, and no immoral or disorderly conduct on their part has been suggested (JS 3a).

Boraas, Parish and Truman each came to the Dickman house after extensive individual searches for accommoda-

* The statement of changed circumstances pending appeal set out in Appellants' Brief at 8 is accurate and reflects the situation as of the date of this brief.

tions in the Stony Brook vicinity. Each found that rents were prohibitive for the few apartment units which were available and that only dormitories on campus or cooperative residences like that which they evolved in the Dickman house were financially feasible. Moreover, each of the student Appellees found the arrangement in the Dickman house to afford an attractive, convenient and congenial residential life style—and one which afforded a useful forum for scholarly exchange (JS 3a).

The Building Zone Ordinance of the Village of Belle Terre restricts the use of land in the village to single family houses, and further, restricts the actual occupancy of each house to a single family. "Family" is defined as follows:

> "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family." Article I, Section D-1.35a (JS 4a).

The Village of Belle Terre contains approximately 220 single family houses, occupied by about 700 people (JS 2a). Belle Terre is essentially fully developed (see n. 51, *infra*), with these houses spread over the Village's total area of approximately one square mile (or 640 acres). There are no industrial, commercial or institutional facilities in the Village (A48).

On June 8, 1972, Boraas and Truman were denied residents' beach permits because they were regarded by a Village official as "illegal residents," and as such not

entitled to use of the Village beach. On July 19, 1972, the Dickmans, the owners-lessors, were served with a summons returnable before the Village Justice on July 28, 1972. However, because the Village had failed to comply with the procedural requirements of its ordinance, in that no notice of violation had been served, the summons was withdrawn. On July 31, 1972, the Dickmans were served with an "Order to Remedy Violations" which notified plaintiffs that failure to remedy the condition might subject them to liability commencing on August 3, 1972 (JS 4a).

On August 2, 1972, this action was commenced in the United States District Court for the Eastern District of New York, seeking preliminary and permanent injunctive relief against enforcement of the ordinance and a declaratory judgment invalidating as unconstitutional the prohibition against residential occupancy by more than two persons "not related by blood, adoption or marriage." Pending a hearing on the constitutional issues, District Judge John F. Dooling, Jr. issued a temporary restraining order. Following a hearing on plaintiffs' motion for a preliminary injunction, Judge Dooling on September 20 denied the motion for a preliminary injunction and upheld the validity of the ordinance (JS 51a).

Plaintiffs appealed the denial of the preliminary injunction to the United States Court of Appeals for the Second Circuit. The Court of Appeals concluded, *inter alia,* that "[t]he discriminatory classification created by the Belle Terre ordinance does not appear to be supported by any rational basis that is consistent with permissible zoning objectives" (JS 25a). Accordingly, the Court of Appeals reversed the order of the District Court and remanded the

matter for further proceedings.* On remand to the District Court, and upon all the papers and proceedings heretofore had herein, and upon the oral representations made to the Court by the parties, to the effect that neither party intended to supplement the evidentiary record, District Judge Dooling entered a final judgment declaring the relevant portion of the ordinance unconstitutional and permanently enjoining its enforcement (JS 83a). The Village of Belle Terre appealed the District Court's judgment to the United States Court of Appeals for the Second Circuit which, in light of its prior determination, summarily affirmed the declaratory judgment and injunction on May 1, 1973 (JS 81a). It is from this judgment that the Village of Belle Terre and the individually named defendants appealed.

Summary of Argument

Absent a finding that some stricter standard of review is appropriate, legislative classifications challenged under the Equal Protection Clause must be shown to be "rationally related" to a legitimate governmental interest. The interests upon which the Village of Belle Terre relies as justifying its exclusion of unrelated households fall under two heads: first, the Village candidly acknowledges that it wants to effectuate the social preference of its residents for neighboring households comprised of traditional families; second,

* Prior to remand, a poll of the judges in regular active service was taken as to whether this action should be reheard *en banc*. The request for rehearing *en banc* was denied, four judges dissenting (JS 41a).

the Village asserts more traditional zoning interests, to wit, regulating density of population, controlling rents, and reducing transiency.

I.

The desire of the residents of Belle Terre to exclude households which they regard as uncongenial is not a legitimate governmental interest. The pursuit of such an interest is at drastic odds with the rights of travel and privacy, and more broadly, with the guarantees of personal freedom and limitations upon state action in the first section of the Fourteenth Amendment. Moreover, even if it is within the power of the state to create socially homogeneous enclaves, it is impermissible for a single municipality like the Village of Belle Terre to undertake to make such an enclave of itself.

II.

No legitimate interest of government is rationally related to the contested ordinance. An examination of the "traditional" interests with which the Village seeks to justify the challenged ordinance indicates that these are not actual concerns of the Village, and that the empirical connection between the ordinance and these interests is wholly unsubstantiated, and in some respects starkly contradicted by the available data. When the primary purpose of an enactment is illegitimate, attempts to "sanitize" the classification by adducing hypothesized legitimate interests should be rebuffed.

III.

The Belle Terre ordinance impinges upon the fundamental rights of privacy and travel. Accordingly, it is appropriately judged by the rigorous standards of the compelling state interest test. Alternatively, it should be measured against the evolving intermediate standard of review. In either event, some form of the "less drastic means" principle is appropriate. Viewed through the lens of that principle, the "traditional" interests advanced by the Village cannot possibly justify the challenged ordinance.

ARGUMENT

Introduction

Forty-seven years ago, in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), this Court sanctioned comprehensive land use regulation as a valid exercise of the police power. Since *Euclid*, the Court has only infrequently had occasion to consider cases involving municipal zoning enactments.[1] On those occasions, it has consistently reaffirmed the general propriety of governmental undertakings directed towards the segregation of incompatible uses of land and the facilitation of the productive use and enjoyment of land. The *Euclid* decision has spawned the almost universal acceptance of comprehensive municipal zoning in the United States.

But the power to place restraints on the use of land is, like all governmental power, susceptible of abuse. And even before the enactment of the first comprehensive zoning law in the United States, the capacity of the state to regulate land was perverted by sporadic municipal efforts to exclude persons who were regarded as undesirable from the use of land.[2] Municipal ordinances have been employed in attempts to separate white and black citizens,[3]

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[1] See *Gorieb* v. *Fox*, 274 U.S. 603 (1927); *Zahn* v. *Board of Public Works*, 274 U.S. 325 (1927); *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928); and *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928).

[2] See, e.g., *In re Lee Sing*, 43 Fed. 359 (C.C.N.D. Cal. 1890).

[3] See pp. 35 to 37, *infra*.

to keep out families with children,[4] keep out the old,[5] keep out the young,[6] and keep out the physically and psychologically infirm.[7] In those relatively rare instances when such enactments have surfaced, courts at all levels have been quick to invalidate them, whether the exclusion has been patently invidious, as in racial zoning ordinances, or seemingly benign, as in the case of ordinances which reserve neighborhoods for elderly citizens.[8] The broad judicial tolerance of zoning restraints has been withdrawn in the face of such abuses.

The ordinance challenged in this action not only purports to say who may and who may not live in the Village of Belle Terre, it seizes upon a criterion of exclusion which is based upon the deeply personal choices of individuals to live together in a common household. To the residents of the Village, the prospect of sharing their community with a household of persons not related by blood, adoption or marriage was apparently offensive. Without more, this would be a matter of personal taste. But when the officials of the Village project these social preferences into law, it becomes a matter of serious constitutional concern. The burden of the argument which follows is that the Belle Terre ordinance, like the barracks of Sparta, is founded upon a view of the "relation between individual and state" which is "wholly different from [that] upon which our institutions rest." *Meyer* v. *Nebraska,* 262 U.S. 390, 402 (1923).

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[4] See note 11, *infra.*

[5] See note 12, *infra.*

[6] See p. 40, *infra.*

[7] See note 12, *infra.*

[8] See p. 40, *infra.*

I.

The social preference of the residents of the Village of Belle Terre for neighboring households comprised of families is not a legitimate interest of government, and cannot be proffered as justification for the challenged ordinance.

A. *The Nature of the Issue.*

Central to the decisions of the District Court and Court of Appeals below was the question whether the social preference of families residing in a municipality to associate only with other families could be the basis for an ordinance which excluded households of persons not related by blood, adoption or marriage. The District Court rested its judgment on an affirmative resolution of this question.[9] The Court of Appeals, however, firmly rejected the view that residents of a community are entitled to project their social preferences into law and, on the basis of such preferences, to justify the exclusion of any residents who would disrupt the homogeneous residential environment of their community:

> "Turning to the question of whether the Belle Terre ordinance may be sustained upon application of the foregoing principles, we start by examination of the sole ground upon which it was upheld by the district court, namely, the interest of the local community in

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[9] "The threshold question then becomes, whether there is any legally protectable affirmative interest in the establishment of even one such zoning district of marriage-and-blood-related families living in single-family dwelling houses. Such a zoning ordinance as Belle Terre's of itself indicates the existence of an interest on the part of such families in establishing a place of association to the exclusion of all other kinds of land uses ...." (JS 73a-74a).

the protection and maintenance of the prevailing traditional family pattern, which consists of occupancy of one-family houses by families based on consanguinity or legal affinity. In our view such a goal fails to fall within the proper exercise of state police power. It can hardly be disputed—and the district court so found—that the ordinance has the purpose and effect of permitting existing inhabitants to compel all others who would take up residence in the community to conform to its prevailing ideas of lifestyle, thus insuring that the community will be structured socially on a fairly homogeneous basis. Such social preferences, however, while permissible in a private club, have no relevance to public health, safety or welfare" (JS 18a).

• • • • •

"The effect of the Belle Terre ordinance would be to exclude from the community, without any rational basis, unmarried groups seeking to live together, whether they be three college students, three single nurses, three priests, or three single judges. Although local communities are given wide latitude in achieving legitimate zoning needs, they cannot under the mask of zoning ordinances impose social preferences of this character upon their fellow citizens. To permit such action would be to invite, upon similar guise, zoning laws that would restrict occupants to those having no more than two children per family, those employed within a given radius, those earning a minimum income, or those passing muster after interview by a community 'Admissions Committee.' While such selective exclusion may be practiced by private institutions, it cannot be tolerated on the part of a governmental body such as Belle Terre, which is bound to serve the public" (JS 19a).

The burden of this portion of the Appellees' argument is that the conclusion of the Court of Appeals below is

well founded. In advancing this claim, it is useful to consider the nature and rationale of a determination that a given purpose or goal is not a proper or legitimate interest of government.

The starting point for constitutional analysis of governmental classifications is the identification of a legitimate governmental interest which is advanced by the challenged enactment. If no such interest can be identified, the classification must fail as violative of the Equal Protection Clause, and the inquiry need proceed no further. See, e.g., *Reed* v. *Reed,* 404 U.S. 71 (1971); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972); and *United States Department of Agriculture* v. *Moreno,* 93 S. Ct. 2821 (1973). Necessarily, there are limits to the interests which governmental entities can properly pursue, limits which flow from the Constitution. While the guarantees of liberty in the Constitution are framed in terms of protections afforded individual citizens, they also serve to limit the range of interests which can legitimately be sought by government.

Thus, the Equal Protection Clause itself voids of legitimacy a governmental purpose to injure any discrete group. See *United States Department of Agriculture* v. *Moreno, supra,* 93 S. Ct. at 2826. Were this not the case, the guarantee of equal protection of the laws would have no meaning at all. Similarly, a governmental restriction on public expression could not be justified on the grounds that "public officials disapprove the speaker's views." *Niemotko* v. *Maryland,* 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring). Recognition of such a purpose as proper would conflict with the essence of the First Amendment's guarantee of freedom of expression. And thus, a restriction on, or impediment to, the in-migration of persons from other states could not

be validated on the ground that it advances the interest of the state in excluding certain classes of persons from assuming residence. *Shapiro* v. *Thompson*, 394 U.S. 618, 629 (1969); *Edwards* v. *California*, 314 U.S. 160, 173-74 (1941). Such an objective does violence to the precepts of the right to travel.

The personal freedoms assured in the Constitution embody root perceptions of society. When a given objective of government is itself at fundamental odds with these constitutionally enshrined perceptions, it cannot be proffered as justification for governmental activity. Governments cannot seek to accomplish ends which are the very negation of constitutionally secured rights. See *Shapiro* v. *Thompson, supra*, 394 U.S. at 631.

The questions of whether an asserted interest of government is legitimate and whether a right secured by the Constitution has been abridged are related but significantly different and may be resolved independently. If the only interests advanced by a governmental classification are illegitimate, it fails and there is no need to ask whether the classification abridges a specific protected freedom. For example, without reaching the question of whether persons have a constitutionally protected interest in communal living, the Court has determined that it is not a legitimate interest of government to injure persons who decide to live in this fashion. See *United States Department of Agriculture* v. *Moreno, supra*, 93 S. Ct. at 2826. Similarly, in the instant case, it is possible for the Court to consider Appellees' contention that the goal of household uniformity in the Village of Belle Terre is not a legitimate interest of government without reaching the broader question of

whether any substantial interference with the right of unrelated groups to live in a community impinges upon constitutionally protected rights.

Inquiry into an unrevealed, disputed governmental purpose is not always appropriate. Compare *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 461-62 (1972) (Burger, C.J., dissenting), and *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484, 488-90 (1972) (Burger, C.J., concurring), with *Palmer* v. *Thompson*, 403 U.S. 217 (1971). But when a governmental entity asserts that its actions are prompted by a given interest and relies upon that interest for justification of its actions, judicial evaluation of the constitutional validity of the professed interest is appropriate; indeed, it is essential.

To this point, Appellees have intended only to demonstrate the propriety of judicial inquiry into the legitimacy of governmental interests which are advanced in support of challenged legislation. What follows is Appellees' support for the conclusion of the Court below that the desire of the Village of Belle Terre to exclude persons whose household arrangements were perceived as uncongenial is not a legitimate governmental interest. In this regard, Appellees' argument in support of the conclusion reached by the Court of Appeals is fourfold: first, that the projection of such local preferences into law is inconsistent with the right to travel and thus is not a proper goal of government; second, that it is inconsistent with the right of privacy and thus is not a proper goal of government; third, that the use of the coercive power of the state to effectuate these social preferences is at drastic odds with the "Fourteenth Amendment's concept of personal liberty and restrictions

upon state action;"[10] and fourth, that even if, *arguendo*, a state may undertake to create socially homogeneous residential enclaves, no single community like the Village of Belle Terre can unilaterally undertake to make of itself such an enclave.

B. *The Desire to "Fence Out" Socially Undesirable Persons or Households From a Municipality Is Inconsistent With the Right to Travel and Is Therefore Not a Legitimate Interest of Government.*

The assertion that the families who reside in the Village of Belle Terre can use the coercive power of the state to advance their preference to be surrounded exclusively by other families is novel and deeply disquieting. If families may exclude those who live together but are unrelated, then presumably a community in which families with children predominated could exclude childless households; a largely childless community could exclude families with children.[11] In like fashion, communities of the young could exclude the aged or the infirm;[12] older citizens could un-

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[10] *Roe* v. *Wade*, 410 U.S. 113, 153 (1973).

[11] At least one community, in New Jersey, actually has an ordinance which limits occupancy in multiple dwellings to one preschool-age child per dwelling unit and forbids occupancy by school-age children. See Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 Syr. L. Rev. 475, 488 n. 24 (1971). But see *Molino* v. *Mayor & Council of Borough of Glassboro*, 116 N.J. Super. 195, 281 A.2d 401 (1971) (Bedroom limitations on apartments invalidated).

[12] In *Women's Kansas City St. Andrew Soc.* v. *Kansas City, Mo.*, 58 F.2d 593 (8th Cir. 1932), the City's defense of an ordinance excluding an old age home in an extant residential structure was bottomed, in part, on the view that "wheeled chairs and invalidism are ever present . . . that such settings are not conducive to the happiness of the people who live in the residence district and

dertake to secure their own communities against the influx of the young;[13] college educated persons could create enclaves for themselves; or, as the Court of Appeals below suggested,[14] communities could establish admissions committees to pass on the fitness or congeniality of prospective residents. The vision which emerges is that of a society divided by law into a congeries of socially homogeneous enclaves.

Such a vision is drastically incompatible with the right to travel. That right, firmly established as fundamental to our constitutional precepts, see *United States* v. *Guest*, 383 U.S. 745 (1966), *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), and *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), includes in its most crucial extent the right to migrate and settle. See *Shapiro* v. *Thompson*, *supra*, 394 U.S. at 629, and *Dunn* v. *Blumstein*, *supra*, 405 U.S. at 338.[15] Communities which seek to exclude those persons whose pres-

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cause gloom to cloud an otherwise peaceful existence." 58 F.2d at 602. The Court of Appeals invalidated the ordinance. See p. 38, *infra*.

The City of Long Beach, New York, recently attempted to exclude the physically or psychologically infirm by prohibiting all hotels, boarding and rooming houses from registering persons who require continuous psychiatric, medical or nursing services, and from providing any of these services to residents. An establishment not complying with these provisions cannot be licensed. Ordinance No. 1195/73, amending Municipal Code of the City of Long Beach, ch. 5, §1, by adding art. 7 (Dec. 27, 1973).

[13] Senior citizen districts have been instated in a few communities. Where challenged, they have been struck down. See p. 40, *infra*.

[14] See p. 12, *supra*.

[15] In both *Shapiro* and *Dunn*, the concern is clearly with the penalties borne by the person who has recently assumed residence in a community. Neither welfare benefits nor the franchise are plausibly the due of the transient who is "passing through" a

ence is offensive are interfering in the most direct fashion possible with the exercise of this right. Unlike *Dunn* and *Shapiro*, where the person who resettles is merely penalized by the denial of perquisites available to long-term residents, this sort of exercise of the zoning power denies the very right of settlement. In this respect, municipal ordinances founded upon the purpose of maintaining a particular social milieu are most nearly like the state law invalidated in *Edwards* v. *California*, 314 U.S. 160 (1941); that law deterred indigents from assuming residence in the state by penalizing those who knowingly assisted in their migration. But this sort of ordinance, by directly prohibiting occupancy, goes still further.

In *Edwards* v. *California, supra*, the Court held that the purpose of prohibiting "the transportation of indigent persons across the California border" is not a legitimate interest of the state. 314 U.S. at 173-174. And in *Shapiro* v. *Thompson, supra*, the Court held that "the purpose of inhibiting the migration of needy persons into the State is constitutionally impermissible." 394 U.S. at 629. The mu-

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place. In *Cole* v. *Housing Authority of the City of Newport*, 435 F.2d 807 (1st Cir. 1970), Judge Coffin found as follows:

> "The Court [in *Shapiro*] apparently uses 'travel' in the sense of migration with intent to settle and abide. *See* Note, Shapiro v. Thompson: Travel, Welfare and the Constitution, 44 N.Y.U. L. Rev. 989, 1012 (1969). Thus, laws that comparatively disadvantage persons traveling to take advantage of state benefits and then leaving are permissible under *Shapiro*. . . . A resident of Maine vacationing for a month in New Hampshire might be penalized for traveling if he could not obtain the benefits of a library card in New Hampshire during his vacation. Nevertheless, a residency requirement so 'penalizing' that kind of travel is probably permissible under *Shapiro*." 435 F.2d at 807 (footnotes omitted).

See also *King* v. *New Rochelle Municipal Housing Authority*, 442 F.2d 646 (2d Cir. 1971).

nicipal purpose of excluding persons who are perceived as uncongenial to the present residents of the community can surely fare no better.

The foregoing assumes, however, that the right to travel includes the right to migrate and settle within a state as well as between states. While the Court has only considered and delineated the contours of the right in the interstate context, there are compelling reasons for extending the analysis to embrace the intrastate circumstance as well. The claim for limitation of the right derives, presumably, from its association with the Commerce Clause. See *Edwards* v. *California, supra,* and the *Passenger Cases,* 7 How. 283 (1849). But in *Shapiro* v. *Thompson, supra,* the Court specifically eschewed reliance upon any particular provision of the Constitution in framing the right to travel, noting that it had been ascribed as well to the Privileges and Immunities Clause of Art. IV, Section 2, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Due Process Clause of the Fifth Amendment. 394 U.S. at 630, n.8 & text.

It would do implausible injury to the "constitutional concepts of personal liberty," which are the predicate of the right to travel, *Shapiro* v. *Thompson, supra,* 394 U.S. at 629, to construe that right as assuring migration to and settlement within a state for persons coming from without that state, while permitting drastic curbs on movement and settlement wholly within a state.[16] The Courts of Appeals for the First and Second Circuits have specifically rejected this result, holding that the right to travel applies in its full extent to the claims of those who wish to make their homes in specific communities. *King* v. *New Rochelle Municipal Housing Authority,* 442 F.2d 646, 648 (2d Cir.

[16] See Freund, *Police Power* 529 (1904).

1971); *Cole* v. *Housing Authority of the City of Newport*, 435 F.2d 807 (1st Cir. 1970). See also *Valenciano* v. *Bateman*, 323 F. Supp. 600, 603 (D. Ariz. 1971) (three-judge court); and *Demiragh* v. *DeVos*, 476 F.2d 403 (2d Cir. 1973).

The Village of Belle Terre seeks to buttress its claim that the social preferences of its residents for neighboring family households can be projected into law by noting that "families are per se legitimate objects of public concern and support" (Appellants' Brief at 25). As the Court recognized in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972), "the regulation and protection of the family unit have indeed been a venerable state concern." To acknowledge this is merely to agree that in some matters families may be given favored treatment; so, indeed, in appropriate circumstances, may other groups such as the very old, the very young, and the infirm. But to grant that the state has a special concern with the welfare of a particular group is not to grant that the state can do things on behalf of such a group that conflict with basic precepts of the Constitution, nor to suggest that such a group can have its preference for social homogeneity effectuated by the coercive machinery of the State where other groups cannot. And the Village offers no support for the belief that securing uniformity of family households in Belle Terre will protect the institution of the family.[17]

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[17] There is some suggestion in Appellants' brief that the Belle Terre ordinance supports the family by setting aside houses for families. See Appellants' Brief at 26. If the claim is that there is a shortage of homes for families within the region of which Belle Terre is a part, or even in the Village itself, there is absolutely no evidence in the record to support such a claim; indeed, there is not even an assertion by Appellants that such a need exists. If the claim is that rental units will be priced out of the

The claim of this portion of Appellees' argument is simply that the goal of preserving social homogeneity is not a proper interest of government. It is not argued that Appellees or other persons have a right to live wherever they may please; nor that zoning restraints on residential uses generally bear a special burden of justification. Rather, Appellees' position is that a community, when it limits the kind of persons or housholds who may live in those areas which it has set aside for residential uses, cannot legitimately offer as the purpose of its so doing the goal of preserving a particular social ambiance. More specifically, Appellees here argue that the legal recognition of such a goal is inconsistent with the right to travel.

C. *The Specific Desire to Exclude Persons From a Municipality Because Their Chosen Household Arrangements Are Uncongenial to the Present Residents Is Inconsistent With the Right of Privacy, and Is Therefore Not a Legitimate Interest of Government.*

Appellees' argument in Point IB of this brief, above, is directed to the proposition that social homogeneity is not a legitimate interest of government. In this section the argument is narrowed: the proposition advanced is that the particular kind of social homogeneity pursued in the Belle

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reach of families, that is a separate point made elsewhere by the Appellants and is met by the Appellees at p. 54, *infra*.

The Court of Appeals below also failed to find a rational connection between the ordinance and the institution of the family unit:

> "Even assuming *arguendo* that a social predilection in the form of entrenched traditional family units constituted a valid zoning objective, we fail to find a shred of rational support for the means used here to achieve that end. It is not suggested that appellants or unrelated groups functioning as a single housekeeping unit, endanger the health, safety, morals or welfare of existing residents of the community. The most that can be said is that they differ from existing residents solely because of lack of blood or marriage ties" (JS 19a).

Terre ordinance—that of uniformity of household organization—is beyond the scope of legitimate governmental interests, because it is at fundamental variance with the precepts of the right of privacy.

The zoning ordinance which is challenged here prohibits persons from forming households comprised of more than two unrelated individuals anywhere within the Village of Belle Terre. As a complete barrier to the decision by three school teachers, four priests, or six students to form a common household, the ordinance thoroughly upsets settled expectations and perceptions about the limits of governmental intrusion into the personal affairs of citizens. The outrage to common sensibilities which such an enactment presents is directly reflected in established constitutional doctrine assuring individuals the right of privacy. When a community undertakes to exclude certain residential households because of the kinds of choices made by the individuals in those households concerning the persons with whom they wish to live, it has exceeded the bounds of its legitimate goals as a governmental subdivision.

It is now well established that the Constitution creates "zones of privacy" into which the state may not intrude except under genuinely compelling circumstances. See, e.g., *Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); and *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Were it possible to map the area of personal choice protected by this right of privacy, the home would lie at or near its center; and, within the home, the

close personal associations of the individuals who lived there would in turn occupy a central position.

The home has long been considered to be a sanctuary of personal privacy. "The sanctity of a man's home" and "the privacies of life," *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), *Griswold* v. *Connecticut*, *supra*, 381 U.S. at 484, are closely intertwined and interdependent notions.

In *Stanley* v. *Georgia*, *supra*, the Court founded its judgment on the premise that "a state has no business telling a man, sitting alone in his own house, what book he may read or what films he may watch." 394 U.S. at 565. In *Paris Adult Theatre I* v. *Slaton*, 93 S. Ct. 2628 (1973), the Court underscored the importance of the home as a special and primary locus of personal privacy:

> "This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." 93 S. Ct. at 2639.
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> "If obscene material unprotected by the First Amendment in itself carried with it a 'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the 'privacy of the home', which was hardly more than a reaffirmation that 'a man's home is his castle.'" *Id.* at 2640.
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> "The protection afforded by Stanley v. Georgia, *supra*, is restricted to a place, the home." *Id.*, n.13.

The choice as to with whom one will make his home touches upon a very crucial aspect of the right of privacy. The association of the individual partners in the marriage

relationship was the foundation of the majority opinion in *Griswold, supra,* 381 U.S. at 486. There, marriage was described as "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." In *Eisenstadt* v. *Baird, supra,* the Court reiterated the associational foundation of the *Griswold* decision and indicated that unmarried individuals participated equally in the right to privacy relied upon in *Griswold.*[18] See also, *Paris Adult Theatre I* v. *Slaton, supra,* 93 S.Ct. at 2640, n.13, where the Court notes the importance to the right of privacy of a "protected intimate relationship".[19]

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[18] "If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969). See also Skinner v. Oklahoma, 316 U.S. 535, 86 L.Ed. 1655, 62 S.Ct. 1110 (1942); Jacobson v. Massachusetts, 197 U.S. 11, 29, 49 L.Ed. 643, 651, 25 S.Ct. 358 (1905)." *Eisenstadt* v. *Baird, supra,* 405 U.S. at 453-54.

[19] Mr. Justice Douglas has rested the associational rights of unrelated persons living together on more explicit First Amendment grounds:

"This case involves desperately poor people with acute problems who, though unrelated, come together for mutual help and assistance. The choice of one's associates for social, political, race, or religious purposes is basic in our constitutional scheme. NAACP v. Alabama, 357 U.S. 449, 460, 2 L.Ed.2d 1488, 78 S.Ct. 1163; Dejonge v. Oregon, 299 U.S. 353, 363, 81 L.Ed. 278, 57 S.Ct. 255. NAACP v. Button, 371 U.S. 415, 429-431, 9 L.Ed.2d 405, 83 S.Ct. 328; Gibson v. Florida Investigating Committee, 372 U.S. 539, 9 L.Ed.2d 929, 83 S.Ct. 889; NAACP v. Alabama, 377 U.S. 288, 12 L.Ed.2d 325, 84

Decisions concerning one's household associations are of great personal importance and sensitivity. The general quality of a person's life is closely tied to the living arrangements he or she has evolved. The kind of social, cultural and intellectual companionship which is enjoyed in a household is at the very core of the living experience of its members.[20]

More particularly, the decision whether to live with persons to whom one is related by blood, marriage, or

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S.Ct. 1302. It extends to 'the associational rights of the members' of a trade union. Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 8, 12 L.Ed.2d 89, 84 S.Ct. 1113.

"I suppose no one would doubt that an association of people working in the poverty field would be entitled to the same constitutional protection as those working in the racial, banking, or agricultural field. I suppose poor people holding a meeting or convention would be under the same constitutional umbrella as others. The dimensions of the 'related' persons problem under the Food Stamp Act are in that category. As the facts of this case show, the poor are congregating in households where they can better meet the adversities of poverty. This banding together is an expression of the right of freedom of association that is very deep in our traditions.

"Other like rights have been recognized that are only peripheral First Amendment rights—the right to send one's child to a religious school, the right to study the German language in a private school, the protection of the entire spectrum of learning, teaching, and communicating ideas, the marital right of privacy. Griswold v. Connecticut, 381 U.S. 479, 482-483, 14 L.Ed.2d 510, 85 S.Ct. 1678." *United States Department of Agriculture* v. *Moreno, supra,* 93 S.Ct. at 2829-31 (Douglas, J., concurring).

[20] The above proposition is particularly demonstrated by the household arrangement created by the student Appellees herein. Such an arrangement evolved not merely because it was attractive, congenial and financially feasible. In addition, the unity of interest in the study of sociology was a common factor in the experience of the student Appellees, and the living arrangement which was created in the Dickman house afforded a useful forum for scholarly exchange (A10, A20, A31, A34).

adoption is surrounded by acutely personal considerations. Assuming that there are relatives with whom a person could live, the decision may involve such considerations as whether to become independent of one's parents, to separate from one's spouse, or to live in a different home or place from more distant relatives.

It is against this background that Belle Terre's professed interest in securing household uniformity must be evaluated. The families resident in Belle Terre have opted for a criterion of exclusion which is based on the deeply personal choices of individuals who have decided to live together in a common household; and the Village proffers as justification for this enactment the desire of those families to associate only with other persons who have organized themselves into household units comprised of members related by blood, adoption or marriage, that is to say, with persons who have made the same personal choices as have they.

Individual decisions concerning the persons with whom one is to live and the arrangements by which one's household is to be maintained may well be protected by the right of privacy against governmental interference generally.[21] Even if not, they are surely protected against governmental decisions unsupported by any concern other than a feeling by persons in a community that only a narrow mold of household arrangement is socially desirable. To recognize such a preference as a valid interest of government would be to accept the direct imposition of a social predilection held by a preponderance of the present residents of Belle

[21] Appellees advance this argument at p. 60, *infra*.

Terre upon those who have made different personal choices; this would do substantial violence to the precepts of personal liberty and individual choice upon which the right of privacy is founded.

D. *The Use of the Coercive Power of the State to Effectuate the Social Preferences of the Residents of the Village of Belle Terre Is at Drastic Odds With the "Fourteenth Amendment's Concept of Personal Liberty and Restraints Upon State Action."*

The right to travel and the right of privacy are specific facets of the "fundamental" personal freedom which is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). Although the exact Constitutional predicate of these rights may be still open to dispute, see *Shapiro* v. *Thompson, supra*, 394 U.S. at 630, n.8 & text, and *Roe* v. *Wade, supra*, 410 U.S. at 152-53, their general grounding in the "constitutional concepts of personal liberties" is well established. *Shapiro* v. *Thompson, supra*, 394 U.S. at 629, *Roe* v. *Wade, supra*, 410 U.S. at 152-53.

The use of the coercive power of the state to effectuate the social preferences of the residents of the Village of Belle Terre for neighboring households comprised of families is at drastic odds with our democratic tradition and the "concept of ordered liberty" which lies at its heart. Thus, the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action," *Roe* v. *Wade, supra*, 410 U.S. at 153, makes the effectuation of such preferences an improper object for the state to pursue, whether or not the more specific notions of the right to travel or the right of privacy act as barriers to such action.

The evaluation of the claim that an action by government is so inconsistent with our tradition of personal liberty as to transgress the first section of the Fourteenth Amendment is a complex, ultimately subjective task. In substantiating this claim, Appellees will advance and document two contentions: first, that the proposition that a municipality may, by force of law, restrict residential access to its community for the avowed purpose of retaining the social homogeneity of that community is antithetical to this nation's experience, ideology and self-perception as an open, egalitarian and integrated society; and, second, that the response of federal and state courts generally to zoning enactments which aim at social rather than physical compatibility in the use of land has been uniformly negative.

1. The Proposition That a Municipality May, by Force of Law, Restrict Residential Access to Its Community for the Avowed Purpose of Retaining the Social Homogeneity of That Community Is Antithetical to This Nation's Experience, Ideology and Self-Perception as an Open, Egalitarian and Integrated Society.

At the heart of our vision of America as a democratic nation are two distinct yet correlative themes: first, that ours is an open, egalitarian and integrated society; and second, that such a society is furthered and enhanced by extensive geographic mobility.

The relationship between equality, social mobility and the availability of land allowing for geographic mobility was perceived quite early in this nation's history by Alexis de Tocqueville, who observed that,

> "the chief circumstance which has favored the establishment and the maintenance of a democratic system

in the United States is the nature of the territory that the Americans inhabit. Their ancestors gave them the love of equality and of freedom; but God Himself gave them the means of remaining equal and free by placing them on a boundless continent." Tocqueville, *Democracy in America,* 301 (Vintage ed., 1954).

Tocqueville's praedial analysis of American democracy proved both perceptive and prescient. The impulse toward migration and mobility became a significant social dynamic of nineteenth as well as twentieth century America. And this migratory impulse, described by Alice Felt Tyler[22] as "dynamic democracy," significantly furthered the ethnic and cultural integration of American society and thereby facilitated opportunities for social heterogeneity.[23]

That American society has been strengthened by both its mobility and its diversity has been recognized by the chroniclers and critics, prophets and poets of American democracy. Tocqueville's observation recurs consistently throughout American historiography and social criticism.

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[22] See Tyler, *Freedom's Ferment,* 5-22 (Harper pbk. ed., 1962).

[23] The social history of America presents, of course, numerous examples where cultural and social integration was vigorously resisted and frequently feared. The experience of the black American in this country is at once the most obvious and most tragic example of the resistance to integration and the discrepancy between egalitarian ideology and social reality. See Myrdal, *An American Dilemma* (2 vols., 1944); Woodward, *The Strange Career of Jim Crow* (rev. ed., 1957).

The nativism exemplified by the Know-Nothings in the 1850's, and the American Protective Association of the 1880's, and the Populists in the 1890's also provides an unhappy example of resistance to diversity. But their views are generally recognized as inconsistent with democratic principles and values.

Ralph Waldo Emerson,[24] Henry George and Randolph Bourne[25] all found themselves within the mainstream of American thought when they expressed the virtue of diversity within a democracy and further when they saw migration and the accessibility of land as essential factors

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[24] Ralph Waldo Emerson found democratic society strengthened by the diversity within it. Emerson wrote: "The energy of the Irish, Germans, Swedes, Poles and Cossacks, and all the European tribes—and of the Africans, and of the Polynesians,—will construct a new race, a new religion, a new state, a new literature, which will be as vigorous as the new Europe which came out of the smelting-pot of the Dark Ages. . . ." Emerson, quoted in Gabriel, *The Course of American Democratic Thought* 46 (1956).

[25] The progressive movement generally recognized the benefits which cultural and attitudinal diversity bestowed upon American democracy. Eric Goldman notes that "[p]rogressives made up the dominant element in the settlement houses that were undertaking the first systematic Americanization work, and the Americanization work they advocated was no one-way street. The immigrant was not only to learn, settlement workers emphasized; he was to teach. While assimilating, he was to preserve the parts of his heritage which did not conflict with the adjustment to the United States and he was to enrich American culture by bringing to it desirable ideas or customs from his old-country background." Goldman, *Rendezvous With Destiny*, 60-61 (rev. Vintage ed., 1956).

Henry George, a leading progressive and social critic, writing *Progress and Poverty* in 1879, also commented upon American diversity and he additionally saw accessibility to land as an essential factor in the furtherance and perpetuation of democratic principles:

> "This public domain—the vast extent of land yet to be reduced to private possession, the enormous common to which the faces of the energetic were always turned, has been the great fact that, since the days when the first settlements began to fringe the Atlantic Coast, has formed our national character and colored our national thought. . . . The general intelligence, the general comfort, the active intention, the power of adaptation and assimilation, the free, independent spirit, the energy and hopefulness that have marked our people, are not causes, but results—they have sprung from unfenced land. This public domain has been the transmuting force which has turned the thriftless, unambitious European peasant into the self-reliant Western farmer; it has given a consciousness of freedom even to the dweller in crowded cities, and has been a well-spring of

in the furtherance of pluralism and the perpetuation of democratic principles.

But, perhaps the most influential articulation of the interrelationship between mobility, heterogeneity, accessibility to land and democratic ideology was that of Frederick Jackson Turner who, in 1893, presented a paper to the American Historical Association, entitled "The Significance of the Frontier in American History," which theorized that "democracy is born of free land." [28] Central to Turner's explanation of the role of the frontier were notions involving the accessibility of land and the ability to migrate. Turner contended that the "most important effect of the frontier has been in the promotion of

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hope even to those who have never thought of taking refuge upon it. The child of the people, as he grows to manhood in Europe, finds all the best seats at the banquet of life marked 'taken', and must struggle with his fellows for the crumbs that fall, without one chance in a thousand of forcing or sneaking his way to a seat. In America, whatever his condition, there has always been the consciousness that the public domain lay behind him; and the knowledge of this fact, acting and reacting, has penetrated our whole national life, giving to it generosity and independence, elasticity and ambition. All that we are proud of in the American character; all that makes our conditions and institutions better than those of older countries, we may trace to the fact that land has been cheap in the United States, because new soil has been open to the emigrant." George, *Progress and Poverty*, quoted in Hofstadter, *The Progressive Historians* 58-59 (Vintage ed. 1970).

The thematic emphasis of Henry George was on the advantages of geographic mobility. Randolph Bourne, on the other hand, extolled the virtues of cultural diversity in his essays advocating "trans-nationalism." There were of course progressives such as sociologist Edward Ross, whose hostility to cultural pluralism did not comport with the views of Emerson, George and Bourne. See Goldman, *Rendezvous With Destiny, supra*, at 60.

[28] Turner, *The Frontier in American History* 32 (1920). The address did not appear in book form until the publication of this volume. Accordingly, all citations to the Turner essay will be to this work.

democracy here and in Europe."[27] In explaining how and why this was so, Turner observed that throughout this nation's development "interstate migration went steadily on," and he described this migration as "a process of cross-fertilization of ideas and institutions."[28] Furthermore, Turner demonstrated: "... [N]othing works for nationalism like intercourse within the nation. Mobility of population is death to localism, and the western frontier worked irresistibly in unsettling population. The effect reached back from the frontier and affected profoundly the Atlantic coast and even the Old World."[29]

The Turner thesis came to be regarded, according to Richard Hofstadter, as "the closest thing we have had to a seminal contribution to the theory of American history."[30] Because Turner was able to capture "... the characteristic American view of the American past,"[31] his essay in and of itself became part of our democratic faith. Thus, whatever its factual and analytical failings,[32] the Turner thesis remains viable for its articulation of our most esteemed values relating to pluralism, heterogeneity and

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[27] *Ibid.* at 30.

[28] *Ibid.* at 22.

[29] *Ibid.* at 30.

[30] Hofstadter, *The Progressive Historians, supra,* at 136.

[31] Turner, *The Frontier in American History, supra,* at 54.

[32] Turner concededly had his critics. See particularly Wright, "American Democracy and the Frontier," 20 Yale Rev. 349 (1930); Wright, "Political Institutions and the Frontier," in D. R. Fox, ed., *Sources of Culture in the Middle West* 15-38 (1934); Pierson, "The Frontier and American Institutions," 15 New England Quarterly 224 (1942). But see also Billington, "The Frontier in American Thought and Character," in Lewis and McGann, *The New World Looks at Its History* (1963) and Billington, *America's Frontier Heritage* (1966).

egalitarianism as well as for its exposition of the highest aspirations of American democracy.

The perspective of contemporary historians and social critics, however, has advanced beyond Turner's somewhat limited focus on the Western frontier. In general, the contemporary deviation in perspective has resulted in historical and sociological inquiries into other kinds of mobility patterns and their effect on this country's institutional and social development. For example, historians Stanley Elkins and Eric McKitrick suggest that the development of American democracy is influenced "not by the 'frontier' in the narrow and constricted sense of that term, but by the whole process of moving and resettling, common to America from the seventeenth century onward, and of forming new communities." [33] Similarly, Stephen Thernstrom, in an essay describing migration from rural areas to urban communities has pointed out that "the [mobility] statistics bear out the legend that Americans are a restless people." And Thernstrom further found significant correlation between "geographical mobility, that is, physical movement from place to place, and movement through the social scale," thereby suggesting that opportunities for social heterogeneity are advanced by providing opportunities for geographic migration.[34]

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[33] Elkins and McKitrick, "A Meaning for Turner's Frontier," 59 Pol. Sci. Q. 325-30, 585-94 (1954).

[34] Thernstrom, "Urbanization, Migration, and Social Mobility in Late Nineteenth-Century America," in Bernstein ed., *Towards a New Past*, 166-168, 173 (Vintage ed. 1969); see also, Thernstrom, *Poverty and Progress: Social Mobility in a Nineteenth Century City* (1970); Curti, *The Making of an American Community* (1959); Potter, *People of Plenty* (1954); Becker, *Freedom and Responsibility in the American Way of Life* (1945).

In sum, there is a deep and common tradition running through the chronicles of our nation's democratic development. That tradition places heterogeneity and the freedom of migration high among our national ideals. The use of the coercive power of the state to create exclusive, homogeneous residential enclaves is in stark contradiction to that tradition.

2. The Response of Federal and State Courts to Zoning Enactments Which Aim at Social Rather Than Physical Compatibility in the Use of Land Has Been Uniformly Negative.

In *Euclid* v. *Ambler Realty Company,* 272 U.S. 365 (1926), this Court sanctioned comprehensive local zoning as a valid exercise of the police power. The regulations which were considered and validated in the *Euclid* decision were directed towards the segregation of incompatible uses of land and the facilitation of the productive use and enjoyment of land. The *Euclid* decision left open the possibility that zoning regulations of the kind generally endorsed might be unreasonable or unjust in their particular application to specific parcels of land. 272 U.S. at 395-96. In *Zahn* v. *Board of Public Works,* 274 U.S. 325 (1927), and *Nectow* v. *City of Cambridge,* 277 U.S. 183 (1928), the Court considered such specific challenges and laid down guidelines for their resolution. Both cases involved the same basic kind of land use restraints as those considered in *Euclid,* that is, traditional restrictions on uses deemed to be physically incompatible with each other.

Shortly after the decisions in *Euclid, Zahn,* and *Nectow,* the Court considered a very different sort of zoning provision. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U.S. 116 (1928), involved a constitutional

challenge to a municipal zoning provision that barred "philanthropic home[s] for children or for old people" from a zoning district unless "the written consent shall have been obtained of the owners of two thirds of the property within four hundred (400) feet of the proposed building." 278 U.S. at 118. The *Roberge* case might have provided the occasion for a rehearsal of the question raised here, concerning the permissible range of interests pursuable by local governments, but it did not;[35] the Court rested its decision invalidating the ordinance upon the overly broad delegation of authority to local owners, who would be "free to withhold consent for selfish reasons or arbitrarily, and may subject the . . . [landowner] to their will or caprice." 278 U.S. at 122.

The Court has thus never validated zoning devices which speak to the kind of persons or households who may live in districts set aside for residential purposes; and its general validation of comprehensive zoning cannot be construed to include such practices.

Legal challenges to racially motivated zoning laws provide an important insight into the Court's response to zoning which is directed at social separation. In *Buchanan* v. *Warley*, 245 U.S. 60 (1917), the Court struck down an ordinance, adopted in Louisville, Kentucky, which imposed residential segregation by race on the basis of a block-by-

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[35] The Court in *Roberge* did, however, note:

> "We find nothing in the record reasonably tending to show that [the home for the aged's] construction or maintenance is liable to work any injury, inconvenience or annoyance to the community, the district or any person." 278 U.S. at 122.

This language was interpreted by the Eighth Circuit Court of Appeals as implying a limitation on the scope of the police power. *Women's Kansas City St. Andrew Soc.* v. *Kansas City*, 58 F.2d 593, 601 (8th Cir. 1932).

block majority formula. The *Buchanan* case assumes particular significance when set against the then fully accepted view that "separate but equal" facilities for black citizens satisfied the mandate of equal protection of the laws. See *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). Prior to the determination in *Buchanan,* a noted legal scholar, Ernst Freund, had predicted its outsome, attributing the deviation from the principle of *Plessy* v. *Ferguson* to the special place in our constitutional tradition occupied by the right to migrate freely and settle within as well as among the states.[26]

Two state courts also anticipated the decision in *Buchanan* v. *Warley* and struck down ordinances closely resembling the Louisville enactment, despite their articulated fidelity to the view that states and their subdivisions had broad authority to promote and maintain the separation of the races. See *Carey* v. *City of Atlanta,* 143 Ga. 192, 84 S.E. 456 (S. Ct. Ga. 1915); and *State* v. *Darnell,* 166 N.C. 300, 81 S.E. 338 (S. Ct. N.C. 1914). In *Darnell,* the Supreme Court of North Carolina was explicit about its discomfort with the vision of a society in which social preferences as to neighbors were given the force of law:

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[26] "If legitimate purposes do not justify the impairment of the general liberty of migration and settlement, measures for the separation of classes must be still more obnoxious to the constitution. While the United States Supreme Court has sanctioned compulsory separation of white and colored persons in public conveyances, it has intimated that the assignment of separate residence districts on the basis of color, creed or nationality would not be tolerated, and it has been held that Chinese persons cannot be compelled to live in one portion of a city [citing *In re Lee Sing,* 43 Fed. 359 (1890)]. A compulsion of this character will almost invariably be contrary to the equal protection of the laws." Freund, *Police Power* 530 (1904).

"We do not think that the authority conferred by section 44 of the charter to enact ordinances for the 'general welfare of the city' can justly be construed as intended by the Legislature to authorize an ordinance of this kind which establishes a public policy which has hitherto been unknown in the legislation of our state. To do so would give to the words 'general welfare' an extended and wholly unrestricted scope which we do not think the Legislature could have contemplated in using those words. If the board of aldermen is thereby authorized to make this restriction, a bare majority of the board could, if they may 'deem it wise and proper,' require Republicans to live on certain streets, and Democrats on others, or that Protestants shall reside only in certain parts of the town, and Catholics in another, or that Germans or people of German descent should reside only where they were in the majority, and that Irish and those of Irish descent should dwell only in certain localities, designated for them by the arbitrary judgment and permission of a majority of the aldermen. They could apply the restriction as well to business occupations as to residences, and could prescribe the localities allotted to each class of people without reference to whether the majority already therein is of the proscribed race, nationality, or political or religious faith." 166 N.C. at 302, 81 S.E. at 339.

Another set of judicial reactions to municipal zoning which indicate great concern about zoning which seeks social rather than physical compatibility involves those few instances in which municipalities enacted ordinances requiring a minimum cost or value for residential structures. These were invalidated in each instance where the issue was litigated. See *Borough of Speers,* 28 Wash. Co. 224 (Pa. Q.S. 1949); *Brookdale Homes, Inc.* v. *Johnson,* 123 N.J.L. 602, 10 A. 2d 477 (1940), *aff'd,* 126 N.J.L. 516,

19 A. 2d 868 (1941); and *Stein* v. *Long Branch*, 2 N.J. Misc. 121 (1924).

In the wake of the broad endorsement of comprehensive local zoning in *Euclid* v. *Ambler, supra*, the Court of Appeals for the Eighth Circuit reviewed an ordinance which would have excluded a home for elderly women in an extant, single family residence from a residential district. *Women's Kansas City St. Andrew Soc.* v. *Kansas City, Mo.*, 58 F.2d 593 (8th Cir. 1932). In defense of the ordinance, witnesses for the city urged that the home would be "depressing," because of the presence of "wheeled chairs and invalidism," and would not be "conducive to the happiness of the people who live in the residence district." 58 F.2d at 602. The court invalidated the ordinance, reasoning that:

> "To justify such restriction the police power would have to be extended, not only to restricting certain districts to residence purposes, but to restricting such districts to particular classes of residents, and this has been quite universally condemned by the decisions. In Village of University Heights et al. v. Cleveland Jewish Orphans' Homes (C.C.A.) 20 F. (2d) 743,[37] the Court held against discrimination as to the orphanage. The

[37] In *Village of University Heights* v. *Cleveland Jewish Orphans' Homes*, 20 F.2d 743 (6th Cir. 1927), the Sixth Circuit Court of Appeals concluded as follows:

> "We can see many valid reasons, affecting the public welfare, which would justify the exclusion of factories, business houses, shops and even apartment houses from strictly residential districts, but which would not apply to the use of structurally proper cottages for an orphanage; and while an orphanage would no doubt be less agreeable to the community in some respects than a private school or private residences, we are unwilling to hold that it is within the power of the village to prohibit the use of cottages of this character for that purpose." 20 F.2d at 745.

> only difference between that case and this apparently is the question of age of the occupants. It would be very difficult to satisfactorily distinguish the Jewish Orphanage case from this. When the question arose as to the right to discriminate against colored citizens, the Supreme Court held, as we have before pointed out, that such discriminations to color or race violate constitutional inhibitions. If there is no basis for restriction as to color or race or as to an orphans' asylum, how can a discrimination based on age or poverty be sustained? In Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 1070, 30 L.Ed. 220, it is pointed out that the guarantees of protection contained in the Fourteenth Amendment to the Constitution are universal in their application 'to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality,' to which might be added 'or of age or poverty.'" 58 F.2d at 603-604.

In recent years, the lower federal courts have closely scrutinized municipal land use decisions bearing overtones of racial exclusion.[38] While the constitutional prohibition of racial discrimination provides the doctrinal foundation of these decisions, the broader proposition that a municipality "may not restrict the class of Americans to be housed therein" has surfaced as well. See *Crow* v. *Brown*, 332 F. Supp. 382, 390 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972). Recent state court decisions have echoed this theme:

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[38] See, e.g., *Kennedy Park Homes Ass'n* v. *City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. den.*, 401 U.S. 1010 (1971); *Dailey* v. *City of Lawton*, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970); *Southern Alameda Spanish Speaking Orgnaization* v. *City of Union City*, 424 F.2d 291 (9th Cir. 1970); *Crow* v. *Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

"It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area." *Appeal of Kit-Mar Builders,* 439 Pa. 466, 474-75, 268 A.2d 765, 768-79 (S. Ct. Pa. 1970).

"What we will not countenance then, under any guise, is community efforts at immunization or exclusion." *Golden* v. *Planning Board of Town of Ramapo,* 30 N.Y.2d 359, 285 N.E.2d 291, 302, 334 N.Y.S.2d 138, 152 (Ct. App. N.Y.), appeal dismissed, 409 U.S. 1003 (1972).

"Exclusionary zoning may lead to illegal and unwanted conditions which are violative of individual rights. No municipality can isolate itself from the difficulties which are prevalent in all segments of society . . . zoning is not a boundless license to structure a municipality." *Molino* v. *Mayor & Council of Borough of Glassboro,* 116 N.J. Super. 195, 204, 281 A.2d 401 (Super. Ct. N.J. 1971).

The lesson of this survey is plain. When zoning ordinances have become the means of achieving the end of social homogeneity, the broad judicial tolerance for municipal planning enactments has been withdrawn; in its place there is a pattern of virtually uniform condemnation and invalidation of such enactments. This has been true even in recent decisions involving seemingly benign local efforts. Thus, ordinances which reserve residential occupancy for elderly citizens have been invalidated. See *Hinman* v. *Planning and Zoning Comm.,* 26 Conn. Supp. 125, 214 A.2d 131 (Ct. Comm. Pl. Conn. 1965); and *Taxpayers Ass'n of Weymouth Township, Inc.* v. *Weymouth Township,* 42 U.S.L.W. 2274 (N.J. App. Div. Oct. 30, 1973). Indeed, the Supreme Court of Virginia recently invalidated an ordinance which required subdividers to provide a specified percentage of

homes within the financial reach of low and moderate income persons, because it found land use regulations could be used "neither to include nor exclude particular socio-economic groups." *Board of Supervisors of Fairfax County* v. *DeGroff Enterprises*, —— Va. ——, ——, 198 S.E.2d 600, 602 (S. Ct. Va. 1973).[39]

Not surprisingly, ordinances restricting occupancy by households of unrelated persons have also fared poorly in the courts.[40] In *Kirsch Holding Co.* v. *Borough of Manasquan*, 59 N.J. 249, 281 A.2d 513 (S.Ct.N.J. 1971), the Supreme Court of New Jersey considered two ordinances which restricted occupancy to "one or more persons related by blood or marriage occupying a dwelling unit and living as a single nonprofit housekeeping unit" or to "a collective number of individuals living together in one house under one head, whose relationship is of a permanent and distinct domestic character, and cooking as a single housekeeping unit." Even with the addition of this second category of permitted occupancy, the New Jersey Court found the ordinances "sweepingly excessive, and therefore legally unreasonable," 59 N.J. at 251-52, 281 A.2d at 518, and invalidated them. An earlier decision by an intermediate appellate

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[39] There is a significant analytical distinction between ordinances which seek to maintain social homogeneity by excluding non-conforming persons and those which seek to include classes of persons who would not otherwise live in an area. The *DeGroff* decision is proffered here merely as an indicator of general judicial hostility towards the use of land use regulations for the purpose of social engineering.

[40] One federal decision does sustain an ordinance restricting group occupancy. See *Palo Alto Tenants Union* v. *Morgan*, 321 F. Supp. 908 (N.D. Cal. 1970), *aff'd, per curiam*, No. 71-1656 (9th Cir. Nov. 13, 1973). Significantly for the purpose of this discussion, the Court does not rely on the goal of social homogeneity; but rather, upon interests of the sort considered in Point II of this brief, *infra*.

court in New Jersey was to the same effect. See *Gabe Collins Realty, Inc.* v. *City of Margate City*, 112 N.J. Super. 341, 271 A.2d 430 (App. Div. N.J. 1970). The Supreme Court of Illinois held that ordinances which proscribe group occupancy, and which thus "penetrate so deeply . . . into the internal composition of a single housekeeping unit," were beyond the scope of the general welfare provision of the state zoning enabling act. *City of Des Plaines* v. *Trottner*, 34 Ill. 2d 432, 438, 216 N.E. 2d 116, 120 (S.Ct. Ill. 1966).

Our democratic tradition of a mobile, heterogeneous society is reflected in this review of zoning cases. They span six decades and are drawn from the federal judiciary at all levels and from a wide variety of state courts. They are consistent in a view of "ordered liberty" which does not accommodate the use of the coercive power of the state to create exclusive residential enclaves.

E. *Even if, Contrary to the Arguments Above, a State May Undertake to Create Socially Homogeneous Residential Enclaves, No Single Community Like the Village of Belle Terre Can Unilaterally Undertake to Make of Itself Such an Enclave.*

The assertion that it is a legitimate interest of government to divide the state into socially homogeneous enclaves plainly assumes that there will remain readily available attractive, residential opportunities for persons like the Appellees whose households have been excluded from a given community. The District Court relied heavily upon the possibility of the Appellees' finding housing elsewhere than in Belle Terre in validating the Village's ordinance;[41]

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[41] "There is no obstacle to the plaintiff tenants' obtaining legally similar kinds of property in other communities than Belle Terre. There is no present threat that exclusion from Belle

and the Appellants stress the availability of alternate housing in their brief before this court.[42]

It is hard to imagine that a law restricting the occupancy of unrelated persons throughout the state or a region of the state could possibly be defended. But constitutional acceptance of social enclaves on the basis of equal or at least adequate housing opportunities for diverse groups in turn assumes state-wide or region-wide planning mechanisms which are empowered to make such opportunities available and which can be judicially accountable for a failure to have done so. Here, there are no such mechanisms available.[43]

In this case, the Village of Belle Terre, with its small constituency and special community interests, has unilaterally decided to house only traditional families. Without either the means or the will to determine whether adequate housing for unrelated groups exists elsewhere in the region,

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Terre would deny to the plaintiff students the right to live as the group that they are. It may be that, as plaintiffs suggest, other villages, and the Town of Brookhaven, might move in the direction of adopting such a definition of family as Belle Terre has adopted. Should that occur then plainly the facts will have changed and a different case will have been presented than is now presented" (JS 77a).

[42] See Appellants' Brief at 18-25.

[43] The New York Court of Appeals recently concluded:

"Recognition of communal and regional interdependence, in turn, has resulted in proposals for schemes of regional and State-wide planning, in the hope that decisions would then correspond roughly to their level of impact (see, e.g., Proposed Land Use and Development Planning Law, §§2-102, 4-101, 4-102; ALI, A Model Land Development Code, art. 7). Yet, as salutary as such proposals may be, the power to zone under current law is vested in local municipalities, and we are constrained to resolve the issues accordingly." *Golden* v. *Planning Board of Town of Ramapo*, 30 N.Y.2d 359, 375, 285 N.E.2d 291, 300, 334 N.Y.S.2d 138, 149, appeal dismissed, 409 U.S. 1003 (1972).

whether other communities are physically or socially better disposed to house the persons the Village wishes to exclude, or whether, in broad regional terms, Belle Terre is the appropriate place for an enclave of families, the Village has acted. It has totally excluded unrelated households, which the residents of the Village regard as a burden. The effect of this act is to pass the purported burden onto other communities in the region.[44] The purported availability of housing in these other communities is then raised as a defense to constitutional criticism of the exclusion.

Such a deflection of constitutional responsibility presents an insoluble problem of accountability. If Belle Terre can completely exclude households of unrelated persons, how is the Court to treat the next community in the region which attempts such an exclusion? Or how is the third, fourth or fifth community to be treated?

The question of how this or any other Court should treat enactments of other ordinances like Belle Terre's is by no means hypothetical. In Suffolk County, New York, where the Village is located, the exclusion of unrelated persons

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[44] "If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make." *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 474-75, 268 A.2d 765, 768-69 (S.Ct. Pa. 1970).

"Perhaps in an ideal world, planning and zoning would be done on a regional basis, so that a given community would have apartments, while an adjoining community would not. But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city." *Appeal of Girsh*, 437 Pa. 237, 245, 263 A.2d 395, 399, n.4 (S.Ct. Pa. 1970).

from residential zones is becoming a common phenomenon. At least 12 municipalities including Belle Terre have adopted comparable ordinances.[45] In the area around Stony Brook, where the student Appellees attend university, three of the four incorporated Villages have adopted such ordinances.[46]

The Court of Appeals below was sensitive to this problem:

> "If Belle Terre is permitted to exclude appellants from its borders, other nearby communities, in the absence of a coordinated, enforceable regional plan, may be expected to do likewise. Indeed, many already have. The availability of housing in another community, therefore, does not constitute a defense. Carried to its logical conclusion, such an argument might, after all local communities in an entire area had adopted unjus-

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[45] Village of Babylon, Building Zone Ordinance, Art. I, §100(28);
Village of Belle Terre;
Village of Bellport, Ordinances, ch. 10, Art. II, §206.1;
Village of the Branch, Local Law No. 2, 1970;
Village of Dering Harbor, Local Law No. 2, 1970, Art. I, §1-106g;
Town of East Hampton, Zoning Ordinance, General Regulations §309.5;
Town of Huntington, Zoning Ordinance, Art. II, §1(r);
Village of North Haven, Zoning Ordinance 1965, Art. XIII, §13.1;
Village of Old Field, Unified Code of Ordinances, Art. VII, Ch. 7, Zoning, Part 7.2, Definitions §6;
Village of Port Jefferson, Zoning, Ch. 80, Art. IV, Definitions, §80-8;
Village of Sag Harbor, Building Zone Ordinance, Art. II, §1(d);
Village of Southampton, Zoning Ordinance, Art. I, §Q.
See JS 23a n.9.

[46] Village of Belle Terre, Village of Old Field, and Village of Port Jefferson.

> tifiable exclusionary zoning laws, relegate those discriminated against, in this age of the jet plane and superhighway, to distant regions or even to other states" (JS 23a-24a). (Footnote omitted.)

See also, *Demiragh* v. *DeVos,* 476 F.2d 403, 406 (2d Cir. 1973).

Belle Terre's unilateral decision to form of itself a residential enclave for families—or any comparable decision by a single municipality—inherently conflicts with the assumption that adequate residential opportunities for other groups in the society exist. Assuming, *arguendo,* that the creation of social enclaves is a legitimate object of a coordinated state or regional planning effort, an isolated local attempt to effectuate such exclusion must still fail.

II.

The Belle Terre ordinance does not bear a "fair and substantial relationship" to any legitimate interest of government.

Beyond its goal of securing household uniformity, the Village of Belle Terre asserts that its ordinance can be justified by reference to several more traditional objectives. An examination of these professed objectives indicates that the ordinance does not rationally advance them and cannot be sustained on this basis.

Absent a finding that some stricter standard of review is appropriate,[47] legislative classifications challenged under the equal protection clause must be shown to be "rationally related" to a legitimate governmental interest. See, e.g., *United States Department of Agriculture* v. *Moreno, supra,* 93 S.Ct. at 2825. The "rational relationship" test has been formulated in several different ways. One early formulation, recently affirmed by the Court, fairly states its essence: a classification must "rest upon some ground of difference having a fair and substantial relationship to the object of the legislation." *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920); see also *Reed* v. *Reed,* 404 U.S. 71, 76 (1971); and *Eisenstadt* v. *Baird,* 405 U.S. 438, 447 (1972).

Any suggestion that the rational relationship test is tantamount to a reflexive validation of the challenged classification has been fully dispelled by recent decisions of this Court in which the connection between the classification at issue and possible justifying governmental interests has

[47] In Point III of this brief, *infra,* Appellees contend that a posture of strict scrutiny is appropriate in the case at bar.

been examined and found too remote to satisfy the requirements of the test. See, e.g., *United States Department of Agriculture* v. *Moreno, supra; James* v. *Strange,* 407 U.S. 128 (1972); *Jackson* v. *Indiana,* 406 U.S. 715 (1972); *Humphrey* v. *Cady,* 405 U.S. 504 (1972); *Eisenstadt* v. *Baird, supra;* and *Reed* v. *Reed, supra;* see also, *Frontiero* v. *Richardson,* 93 S.Ct. 1764, 1773 (1973) (Powell, J., concurring).[48]

From these recent cases, two rudimentary principles concerning the rational relationship test emerge. First, the test is concerned with actual legislative purposes, not hypothesized, *post facto* explanations which could not rationally have been the intended object of the challenged enactment. See *Eisenstadt* v. *Baird, supra,* and *United States Department of Agriculture* v. *Moreno, supra.* Second, the claim for a "fair and substantial relationship" between the challenged enactment and a legitimate interest of government must be bottomed on some plausible view of empirical reality; wholly unsubstantiated speculation is not sufficient. See, e.g., *Reed* v. *Reed, supra; United States Department of Agriculture* v. *Moreno, supra.*

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[48] These cases, it has been suggested, represent some departure from an earlier tradition of the rational relationship test. In one view, they signal a general vitalization of the test, giving it the substance of its words. See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972). In another, they posit an activated form of the test which is selectively applicable where the personal interests at stake are more substantial than in traditional economic regulation cases. See the opinion of the Court of Appeals below at 14a-18a; see also, *Demiragh* v. *DeVos,* 476 F. 2d 403, 405 (2d Cir. 1973). Whether perceived as a product of a continuation of the traditional test, a generally vitalized test, or a selectively appropriate test, the analysis reflected in these cases is fully applicable to the case at bar, which implicates fundamental personal rights. See Point I of this brief, *supra,* and Point III, *infra.*

These principles assume special prominence in a situation where the challenged classification by its nature strongly suggests that its primary purpose is either of questionable legitimacy (e.g., the desire to prevent the use of contraceptives in *Eisenstadt, supra*) or plainly invalid (e.g., the desire to harm "hippies" in *Moreno,* or the goal of social homogeneity in the instant case). Thus, in *Eisenstadt,* the proffered justifications of the deterrence of fornication and the protection of health were ultimately rejected as utterly implausible explanations of the challenged statute's purpose. 405 U.S. at 448-453. In *Moreno,* the Court acknowledged "considerable doubt" as to the genuineness of the claim that welfare fraud deterrence prompted the statute, 93 S.Ct. at 2826-27, but went on to find the interest insufficiently connected to the challenged provision. *Id.* at 2827. Professed legislative objectives which conveniently "sanitize" a constitutionally questionable or invalid goal should be considered closely.

In the case at bar, Appellants put forward as justification of the contested ordinance, in addition to its primary purpose of securing social homogeneity, the following interests: (1) controlling residential density; (2) preventing rental escalation; and (3) minimizing transiency. The District Court considered and rejected these justifications as insufficiently connected to the challenged ordinance:

> "[I]t is not considered that the case may be rested on population density, traffic problems, over-loaded parking facilities, and the effect on rentals generally" (JS 79a).
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> "Such a restricted zoning district might well be all but impossible to justify . . . by its service of such familiar zoning objectives as safety, adequate light and air,

preservation of the land from overintensive use, avoiding crowding of the population, reduction of traffic congestion and facilitation of adequate transportation, water sewage, school, park and other public services" [49] (JS 74a).

The Court of Appeals found the objectives advanced by the Village to be purely hypothetical and unacceptably speculative:

"If some or all of these hypothesized objectives were supportable, some form of such ordinance might conceivably be upheld as a valid exercise of state police power. Upon the record before us, however, we fail to find a vestige of any such support. To theorize that groups of unrelated members would have more occupants per house than would traditional family groups, or that they would price the latter out of the market or produce greater parking, noise or traffic problems, would be rank speculation, unsupported either by evidence or by facts that could be judicially noticed" (JS 20a-21a).

An examination of the interests relied upon by the Appellants supports the conclusions reached by both Courts below.

Density

The Village claims that the ordinance serves the purpose of regulating the density of population. One initial inquiry, however, is whether the Village has any genuine concern about the density of its population at all; an examination of the record strongly suggests that it does not. The Village

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[49] The same conclusion was reached by the Supreme Court of Illinois in the course of reviewing an ordinance similar to that contested here. See *City of Des Plaines* v. *Trottner*, 34 Ill. 2d 432, 434, 216 N.E.2d 116, 119 (S.Ct. Ill. 1966).

of Belle Terre occupies approximately one square mile, or 640 acres.[50] Over this area are spread 220 single family houses. As the Village is essentially fully developed,[51] this pattern of land use is fixed.[52] The present population is approximately 700, yielding a density of slightly less than 1.1 person per acre. It strains credulity to suppose that in 1971, when the contested ordinance was first enacted, there was any concern at all that the Village, fully developed, would suddenly suffer a surfeit of population, and that this concern was addressed by excluding groups of three or more unrelated persons, while admitting families of all sizes, and any number of servants.[53] The Village, it must be noted, does not assert that it has any such concern, or that density was in fact a consideration in enacting the ordinance.[54] Nor is there any suggestion

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[50] Affidavit of Harriet Coorssen, A48.

[51] This fact does not appear in the record. It is, however, a matter of common local knowledge, readily observable, and not contested by Appellants.

[52] On what little developable land may remain in the Village, houses must be built on a minimum of one acre, can occupy no more than 20% of the lot and cannot exceed 35 feet in height. Building Zone Ordinance of the Village of Belle Terre, Article III, Sections A-1.1a, A-1.2a, and A-1.5b.

[53] Article I Section D-1.35a of the Building Zone Ordinance defines family, in part, as:

> One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants.

[54] There is an added element of improbability inherent in the selection of two unrelated persons as the maximum. Surely if density was the concern a much higher number would have been fixed upon. The Appellants' own explanation for the maximum number indicates that its selection had absolutely nothing to do with density. See Appellants' Brief at 30.

by the Village that any population studies, projections or analyses of any kind were undertaken in this connection. Rather, the position of the Village seems to be that it can *post facto* hypothesize a governmental interest advanced by its ordinance in the abstract, ignoring its actual purpose and ignoring the actual needs of the Village.

Even considered in the abstract, the relationship between the ordinance and the density of population is at best an extremely attenuated one. The essence of the Village's claim is that households comprised of persons related by blood, adoption or marriage tend to be "self-limiting" in size, while households of unrelated persons are not. It is within common experience that traditional family units comprised of husband, wife and children vary in size over a broad range; the additional possibility that "brothers, uncles, grandparents or other relatives" (Appellants' Brief at 32) can live together or with a family unit broadens the range of size still further. The addition of "household servants," who are expressly excepted from the ordinance,[55] makes still more elastic the potential size of families. Conversely, the number of unrelated persons who can and will live and cook "together as a single housekeeping unit," [56] is by no means limitless, either as a matter of law or practicality. To theorize that permitting unrelated households to live in the community would significantly affect density is, as the Court of Appeals below concluded, "rank speculation" (JS 21a). Indeed, it is speculation which conflicts with the available census data. Those data indicate that the percentage of families with seven or more persons is significantly higher

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[55] See note 53 *supra*.

[56] *Id.*

than the percentage of households in general—including families and groups of unrelated persons—with seven or more persons;[57] further, they indicate that the average size of traditional families is somewhat larger than the average size of all households.[58]

If there is an abstract relationship between an ordinance like that contested here and population density, it is slight and unpredictable as to its direction. When set against the realities of the Village of Belle Terre, the relationship is diminished still further. Belle Terre is fully developed with single family homes. Only the most insufferable kind of overcrowding could possibly bring a large group into Belle Terre, overcrowding which could and should be made the object of specific legislative prohibition.

As a claim derived from the density of population assertion, the Village suggests that the ordinance may reduce parking and traffic problems (Appellants' Brief at 32-33). There is no indication that the Village does have or reasonably could anticipate having any genuine concerns in this regard. Parking is presently prohibited on all highways within the Village,[59] and the 700 residents are provided with four municipal parking areas.[60] As to traffic, the Village is comprised of 220 single family homes. It has no industrial, commercial or institutional facilities of any kind to surcharge the roads. Present traffic control is effectuated

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[57] Bureau of the Census, *The American Almanac* 41, Tables 53 and 54 (1973).

[58] *Id.* at 50, Table 50.

[59] Code of the Incorporated Village of Belle Terre, Article VIII, Section 31.

[60] *Id.*, Section 39.

by stop signs or yield signs at 30 intersections within the Village,[61] a circumstance which strongly reinforces the supposition that traffic is light.

Parking and traffic problems are a remote possibility apparently never considered by the Village in connection with the contested ordinance until the advent of the instant litigation. Further, there is no showing of a substantial impact on either parking or traffic with the advent of households of unrelated persons. Families not uncommonly have two adult drivers; and teenage children and household servants can certainly be expected to drive and often own cars in a suburban community. Again, the claim of the Village is utterly speculative, and entirely implausible.

Rents

The Village's contention in this regard is that household groups of unrelated persons can price single families out of the rental market, and that the ordinance prevents this from taking place.

There is no suggestion that the Village was in fact concerned about its rental situation. Nor is there any showing that in the suburban community of Belle Terre there is any significant proportion of the houses even available for rent. Presumably, most homes are owned and occupied by families; and it is virtually inconceivable that any substantial number of the owner-occupied homes are going to be turned over to rentals. Moreover, there is nothing in the record to support the contention that in a middle class, suburban residential community like Belle Terre, traditional families are willing to pay more or less rent than students

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[61] *Id.*, Article VII.

with limited means like the Appellees.[62] And there is no suggestion whatsoever that Belle Terre undertook to determine whether there is any shortage of rental opportunities for single families within the Village or within the area around the Village; or any suggestion that the Village was operating on the basis of a perceived state of affairs in this regard. The rent control interest on which the Village attempts to rely is at once hypothetical in its design, speculative in its need, and utterly remote in its effectuation.

But, even if we accept *arguendo* the claim that some number of traditional families might be priced out of the Belle Terre rental housing market, no justification for the zoning exclusion can be derived. Decent, attractive and reasonable residential opportunities are as important to the members of household groups like the student Appellees as to the members of traditional families. Surely the Village cannot rationally sacrifice the interest of one class of citizens in order to render somewhat more secure the interests of another class, without any effort to measure the actual needs of either.[63]

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[62] The sole information in Appellants' affidavits consists of the rental figures for two houses, which are described only by location and number of bedrooms. See A48. No information is given as to the size of the lots on which the houses sit, or their market value. The utter non-utility of such limited information is reflected in the affidavit itself. A four-bedroom house is said to rent for $350.00; this is a figure entirely in line with the $500.00 rent of the six-bedroom Dickman House. On the other hand, another six-bedroom house is said to rent for $350.00. The only safe conclusion is that no conclusion can be drawn from such sparse data.

[63] A rational decision to totally sacrifice the housing interests of one group to meet the needs of another would depend at a minimum on a full consideration of the regional housing needs and opportunities of the group to be so benefited. It is quite possible that such a decision is simply inappropriate for a small municipality to make. Compare pp. 42 to 46, *supra*.

Without any effort to measure the actual housing needs of either traditional families or unrelated persons such as the student Appellees herein, the justification of the Belle Terre ordinance on the basis of the need to prevent rental escalation amounts to little more than an arbitrary preference for traditional families and an irrational exclusion of unrelated persons. To this extent, the argument returns to the proposition upon which it commenced: that the social preference of the residents of Belle Terre for neighboring households comprised of families is not a legitimate interest of government and cannot be proffered as justification for the challenged ordinance.

Transiency

The Village asserts that its ordinance can be justified as an attempt to minimize transiency.[64] Appellants' Brief at 36-40. This professed interest in preventing a turnover of local population conflicts drastically with the right to travel. That right plainly includes the right to migrate to and settle within a community. See *Shapiro* v. *Thompson, supra; Dunn* v. *Blumstein, supra.*[65] Necessarily this freedom implies the right to leave a place as well.[66] To select

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[64] The Village also speaks of "community stability," but what it apparently seeks to express is the hope that people will remain in the Village. Accordingly, "community stability" means little more than "geographic stability" and the Appellants' stability claim is thus merely a restatement of the transiency argument.

[65] There is a more complete discussion of the right to travel in Point I, *supra,* pp. 16 to 21.

[66] At the time of our colonization, the English Crown by means of the writ *ne exeat regno* had the acknowledged authority to prevent the departure of any person from the kingdom, and one royal proclamation ordered English squires to remain at their manors in the country until the end of summer and attend to their responsibilities. In contrast, the Body of Liberties of the Massachusetts Bay Colony specified the "free libertie" of every man to remove

out and exclude persons because they are perceived as more likely to leave in a relatively short time is to deny persons the right to travel because of a prediction that they will soon exercise that right again. It is difficult to imagine an objective more antithetical to the freedom of migration upon which the right to travel is based.

But even accepting, *arguendo*, the legitimacy of the interest in excluding persons who are likely to remain for a relatively short period of time, the premise that the ordinance serves this interest is wholly unfounded. As the Court of Appeals held, the record reveals no "vestige of . . . support" for such speculation (JS 20a).

The proposition that persons related by blood, adoption or marriage are likely to remain in a community for a longer period of time than a household of persons who do not enjoy such characteristics is utterly unsupportable. It totally ignores the reality of contemporary American migratory patterns. We are an extraordinarily mobile people, carried by professional, educational and social needs from one part of the country to another. According to the 1970 census figures more than one-half of the people in the United States moved to their present homes within the prior five years; and between one-quarter and one-fifth of our population changed their residences within the single year preceding the census.[67] The wishful hypothesis that

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himself and his family from the Colony at will. See Haskins, *Law and Authority in Early Massachusetts* 202 (1960) and Freund, *Police Power* 529, n.24 & text (1904).

[67] Fifty-four percent of the population moved in the five years preceding the 1970 census; 23% within the year preceding the census. U.S. Bur. of Census, Population: Gen. Soc. & Econ. Characteristics, Final Report. PC (1)—C1. U.S. Summary 404 (Table 98) (1970).

Belle Terre is a "tiny Village" which by virtue of this circumstance can escape the migratory forces which prevail elsewhere[68] is likewise flatly contradicted by the available census data. Those data indicate that there is no significant difference in mobility rates as among the nation generally, urban centers of population, and suburban communities, like Belle Terre, situated on the urban fringe.[69]

In sum, the goal of selecting out relatively short-term residents is constitutionally impermissible. Were it proper to attempt such an exclusion, the Belle Terre ordinance would be a completely irrational means of so doing.

In Lewis Carroll's *Through the Looking Glass,* Alice encountered the White Knight, whose slogan was "it's my own invention," and who characteristically generated grossly implausible, ineffective solutions to simple or nonexistent problems. The Village's assertion that the exclusion of nonfamilial households serves the interests of regulating density, controlling rents and reducing transiency comes perilously close to the chronic illogic of the White Knight.[70]

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[68] Appellants' Brief at 36.

[69] Fifty-three percent of the persons living in the urban fringe moved within the five year period preceding the 1970 census, as opposed to 54% nationwide. Twenty-one percent of the people living in the urban fringe moved within the one year period preceding the 1970 census, as opposed to 23% nationwide. *Ibid.*, note 67, *supra.*

[70] "I was wondering what the mouse-trap was for," said Alice. "It isn't very likely there would be any mice on the horse's back."

"Not very likely, perhaps," said the Knight; but, if they *do* come, I don't choose to have them running all about.

"You see," he went on after a pause, "it's as well to be provided for *everything.* That's the reason the horse has all those anklets round his feet."

(*footnote continued on next page*)

If this characterization is unfair to the Village's officials, it is because they do not in reality appear to have intended to effectuate these interests by means of the contested ordinance. Nor, indeed, does the Village appear to have any actual concern with these interests at all.

What Belle Terre has asked this Court to do is to speculate that some village might pass an ordinance like that contested here, that such a village might have legitimate cause for concern in one of these areas, and that such an ordinance at some time or place might have an affirmative bearing on one or more of these concerns. The Village of Belle Terre's own interest in density, rents or transiency is purely hypothetical. Its empirical assertions are wholly unsubstantiated, and often starkly contradicted by readily available data. And its tender of these traditional interests is precisely the kind of claim rejected in *Eisenstadt* v. *Baird, supra,* and *United States Department of Agriculture* v. *Moreno, supra.*

"But what are they for?" Alice asked in a tone of great curiosity.

"To guard against the bites of sharks," the Knight replied. "It's an invention of my own."

Carroll, Through the Looking Glass, in Gardner, ed., The Annotated Alice 298 (Forum pbk. 1960).

III.

The Belle Terre ordinance impinges upon the exercise of fundamental constitutional rights and is appropriately subject to more rigorous review than that mandated by the rational relationship test.

If this Court finds that, (1) the social preference of the Belle Terre residents for family households is not a legitimate interest of government and, (2) that the contested ordinance bears no rational relationship to any legitimate interest of government, then the ordinance is plainly invalid, as found by the Court of Appeals below. If, however, either of these propositions is rejected by the Court, then a third question must be faced, namely, whether the ordinance is properly subject to a stricter scrutiny than that of the rational relationship test, and if so, whether any of the interests proffered in justification of the ordinance survive the scrutiny which is their due. It is Appellees' position that the ordinance should properly be measured against the compelling state interest test, or alternatively, against an intermediate test reflecting a heightened judicial scrutiny; and further, that none of the interests advanced in support of the Belle Terre ordinance can possibly survive either test.

A. *The Belle Terre Ordinance Impinges Upon the Right to Travel and the Right of Privacy; the Compelling State Interest Test Is the Standard by Which It Should Be Judged.*

Where a legislative enactment is found to impinge upon the exercise of a fundamental right, it must be shown "to be necessary to promote a compelling state interest," or it will be held unconstitutional. *Dunn* v. *Blumstein,* 405 U.S.

330, 338-39 (1972). It is firmly established that the right of privacy and the right to travel are fundamental rights, and that impingement upon their exercise triggers the invocation of the compelling state interest test. See *Dunn* v. *Blumstein, supra,* 405 U.S. at 338-39; *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969); *Roe* v. *Wade,* 410 U.S. at 155; and *Eisenstadt* v. *Baird,* 405 U.S. 438, 447, n.7 (1972).

In Point I of this brief, Appellees have argued at some length that the exclusion of persons from a community because they or their households are socially offensive to the residents of that community is antithetical to the precepts of the right to travel.[71] Further, Appellees have argued that the specific criterion of exclusion employed in the Belle Terre ordinance, turning as it does on the deeply personal choices of individuals pertaining to the formation of their households, does violence to the right of privacy.[72]

But the argument in Point I of this brief is directed to the proposition that the pursuit of social compatibility through the Belle Terre ordinance is an improper interest of government. Here, Appellees assert a different claim, namely that the ordinance, whether founded on legitimate interests of government or not, impinges on the fundamental rights of travel and privacy, and can only be justified if necessary to the achievement of a compelling state interest. The essence of the claim in Point I is that acts by government which are motivated by a desire to effectuate social homogeneity inherently threaten fundamental constitutional rights, and that such a desire is for that reason

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[71] See pp. 16 to 21, *supra.*

[72] See pp. 21 to 27, *supra.*

not a legitimate governmental interest. The argument here is that a given enactment, the Belle Terre ordinance, actually does impinge upon the exercise of such rights, whatever its motivation.[73]

Much of the discussion in Point I informs this argument. The claim that the right to travel includes the freedom of intrastate migration and settlement and prohibits the erection of community residential barriers is the predicate of the argument here that the Belle Terre ordinance impinges upon the right to travel. In like fashion, the claim in Point I that decisions concerning the choice of one's household associates are entitled to the protections of the right of privacy is the basis of the argument here that the Belle Terre ordinance impinges upon the right of privacy. The argument here, however, is that the actual impact of the contested ordinance on persons who—like the student Appellees—desire to form households with unrelated persons within the Village of Belle Terre is of the kind that constitutes an impingement upon the rights of travel and privacy; and that the ordinance should, therefore, be subject to rigorous judicial scrutiny. In considering this question, we will treat separately the right to travel and the right of privacy claims.

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[73] In *Dunn* v. *Blumstein*, *supra*, the State of Tennessee argued that the right of travel in *Shapiro* v. *Thompson* depended upon a showing that the state had actually intended to deter migration; this contention was rejected. 405 U.S. at 339-41.

This is not to say, however, that any law which is detrimental to a person who has migrated to a jurisdiction impinges upon the right to travel. Legal standards which are applicable to all persons in a jurisdiction—like a high minimum age for a driver's license—do not trigger the elevated test. See 405 U.S. at 342, n.12 & text. But a uniform law which excludes persons from settlement in a community surely must. See note 74, *infra*, and accompanying text.

1. *The Right to Travel.*

The question of impingement on the right to travel in the instant case is a complex one. The Appellants suggest that the claim of impingement is utterly frivolous, since "all legal prohibitions [could] be said to indirectly infringe on the right to travel of those living elsewhere who would like to come to a municipality to engage in [an] illegal activity" (Appellant's Brief at 40). But a close consideration of the operation of the Belle Terre ordinance will indicate that it directly bars migration and settlement, and that it is not merely a uniform legal standard which happens to be to the detriment of the Appellees.[74]

Consider a hypothetical ordinance which barred persons over the age of 65 from assuming residence within a community. Such a prohibition on residency directly and drastically conflicts with the right to travel. It does more than penalize the person who migrates and settles; it actually proscribes settlement of a class of persons. Such an ordinance could not possibly consist with the right to travel.

Like this hypothetical provision, the Belle Terre ordinance is a direct prohibition on settlement. The distinction lies in the fact that the hypothetical law bars a certain kind of *person*, and the Belle Terre ordinance bars a kind of *household*. It is a distinction of some substance, since the character of one's household is mutable, unlike the characteristic of age. In a sense, therefore, the barrier to residency posed by the Belle Terre ordinance can be surmounted by a voluntary reformation of an unrelated household. A person who wishes to live in Belle Terre can do so

[74] See note 73, *supra*.

singly, with one other unrelated person, or with any number of persons related by blood, adoption or marriage.

But this ignores the claim of the Appellees that the right of privacy protects the personal decision concerning with whom one is to live. If the right of privacy does protect this decision, then Appellees and others like them are faced with a constitutional Hobson's choice: they may exercise their right to migrate to Belle Terre and there settle and abide, but only at the expense of their right of privacy in forming their household; conversely, they may form their household elsewhere, but only at the cost in constitutional coin of forfeiting their right to assume residence in Belle Terre. A law which forces a choice between fundamental rights impinges upon both. See *Dunn* v. *Blumstein, supra,* 405 U.S. at 342.

This raises the question of whether the right of privacy is impinged if unrelated households of more than two persons are excluded from the Village of Belle Terre.

2. *The Right of Privacy.*

The District Court below found that the rights of the student Appellees were not impinged by the Belle Terre ordinance because the students could live elsewhere in a common household,[75] and the Appellants stress this same argument.[76] A number of considerations combine to make it quite plain that Belle Terre's ordinance does indeed impinge on the Appellees' rights, notwithstanding the fact that Belle Terre is only one community among many, and a rather small one at that.

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[75] See note 41, *supra.*

[76] See note 42, *supra.*

The proposition that Belle Terre's ordinance is valid on the theory that it visits only a relatively small injury on the student Appellees because they may live in unrelated groups in other communities is tantamount to a doctrine of "separate but equal." It is a proposition wholly without supportive analogy in contemporary constitutional law. It is clear that a community could not defend against a charge of racial exclusion on the basis that blacks could obtain ample housing in other communities. *Buchanan* v. *Warley, supra.* It is equally clear that an abridgement of free expression could not be justified on the basis of its geographical confinement. In *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), where an ordinance requiring a license for door-to-door canvassing by Jehovah's Witnesses was defended on such a basis, the Court responded:

> "The ordinance . . . sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless the tax is paid. That restraint and one which is city-wide in scope *(Jones* v. *Opelika)* are different only in degree. Each is an abridgement of freedom of press and a restraint on the free exercise of religion. They stand or fall together." 319 U.S. at 117.

The Appellants suggest that a community can violate the right of privacy upon the rationale that such a right is not similarly abridged in other communities. But nothing about the right of privacy as applied to the composition of households makes it susceptible to this kind of limitation, which would be summarily rejected in other constitutional contexts.

Moreover, as demonstrated above, if Belle Terre can completely exclude households of unrelated persons and excuse the constitutional implications of its prohibition on the

basis that such groups can go elsewhere, then so too can each and every other community in the region. A unilateral exclusion by the Village of Belle Terre or any other single community can only be evaluated as though its exclusion were universally adopted.[77] See pp. 42 to 46, above.

Furthermore, the acceptance of the view that a zoning ordinance which would be a clear infringement of the right of privacy if adopted on a broad scale is valid if adopted by a single community leads to the same Hobson's choice considered above in the context of the right to travel. There is a kind of *legerdemain* involved in the Appellants' position: the right to travel argument is met by the suggestion that persons wishing to live in Belle Terre reform their households, and the right to privacy contention is countered

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[77] The Court in *Palo Alto Tenants Union* v. *Morgan, supra,* appears to be sensitive to this problem; its decision seems to require some legal provision for households of unrelated groups in each community:

> "The right to form [communal living groups] may be constitutionally protected, but the right to insist that these groups live under the same roof, *in any part of the city they choose,* is not." (Emphasis added.)

> "The Court must stress what this case is *not* . . . . [t]here [is no] showing that the ordinances challenged operate to totally exclude the indigent or the politically voiceless from the City of Palo Alto. See generally Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent, 21 Stan. L. Rev. 767 (1969); see also Southern Alameda Spanish Speaking Organization v. Union City, 9 Cir. 424 F.2d 291 (1970). The ordinances here challenged affect only two of the many zones into which the City has been divided. Unrelated groups of more than four persons may live together in other zones, including those designated for lodging houses, duplexes, triplexes, and so on." 321 F. Supp. at 912.

This position does not meet the other objections to the view that some housing for groups eliminates any constitutional problems. It does however, make the problem of accountability for providing areas where unrelated groups may live much less acute.

by advice to live somewhere else. After two passes, the substantial personal freedoms at stake have vanished.

The foregoing analysis indicates that the rights of travel and privacy, as more fully amplified in Point I of this brief, are sufficiently implicated and impinged by the Belle Terre zoning ordinance to warrant invocation of the compelling state interest test. Viewed through the lens of this stringent test, the Belle Terre ordinance is glaringly unconstitutional. None of the proffered justifications, even if deemed legitimate, could possibly be considered compelling. Moreover, even if the justifications asserted by the Appellants were found to be compelling governmental interests, the ordinance is not necessary to the promotion of those interests, as will be demonstrated *infra*.[78]

B. ***Alternatively, an Intermediate Standard of Review Incorporating the "Less Drastic Means" Principle Is Appropriate.***

Recent decisions of this Court indicate that the two common alternative standards of scrutiny—the rational relationship and compelling state interest tests—are not the only possible postures of review. In several decisions, the Court has articulated intermediate tests which direct a heightened level of judicial scrutiny but fall short of requiring a compelling state interest. In *Bullock* v. *Carter*, 405 U.S. 134 (1972), the Court struck down the Texas regime of candidate filing fees. The Court in *Bullock* held that the fee scheme should be " 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." 405 U.S. at 144.

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[78] See pp. 71 to 73, *infra*.

Weber v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), also articulated what appears to be a more flexible approach than the stark dichotomy presented by the choice between the rational relationship test and the compelling state interest test:

> "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. Morey v. Doud, 354 U.S. 457, 1 L.Ed. 1485, 77 S.Ct. 1344 (1957); Williamson v. Lee Optical Co., 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461 (1955); Gulf, Colorado & Santa Fe R. Co. v. Ellis, 165 U.S. 150, 41 L.Ed. 666, 17 S.Ct. 255 (1897); Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886). Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny, Brown v. Board of Education, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R. 2d 1180 (1954); Harper v. Virginia Board of Elections, 383 U.S. 663, 16 L.Ed. 169, 86 S.Ct. 1079 (1966). The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" 406 U.S. at 172-73.

Another formulation of what appears to be a more flexible intermediate standard of heightened scrutiny emerged in *Police Department* v. *Mosley*, 408 U.S. 92, 95 (1972): "As in all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment."

While the precise expression employed in each of these decisions is different, there would seem to be a substantial

confluence of analysis, a common ground which becomes clearer upon a closer examination of the cases themselves. In each of these cases, the Court identified legitimate interests which were, to some degree at least, advanced by the classification in question. In each, some adverse impact upon a fundamental personal interest, or some implication of a suspect criterion of classification, or both, were involved. And in each case, while the Court stopped short of concluding that the compelling state interest test was the appropriate standard, the challenged enactment was invalidated.

The cases appear to have in common a modified form of the "less drastic means" principle which is a part of the compelling state interest test:

> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' NAACP v. Button, 371 U.S. 415, 438 (1963), United States v. Robel, 389 U.S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. Shapiro v. Thompson, supra, 394 U.S. at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden of constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Dunn* v. *Blumstein, supra* at 343.

This principle is explicitly echoed in the *Bullock* v. *Carter* formula: "reasonably necessary to the accomplishment of legitimate state objectives." 405 U.S. at 144. See also, *Vlandis* v. *Kline*, 93 S.Ct. 2230, 2239-40 (1973) (White,

J., concurring).[79] It appears to underlie the decisions in *Weber* v. *Aetna Casualty & Surety Co., supra,* and *Police Department* v. *Mosley, supra,* as well.

It is clear that the instant abridgement of the rights of travel and privacy mandates elevated scrutiny of the Belle Terre ordinance. Such strict scrutiny may entail the invocation of the compelling state interest test. Alternatively, it may encompass a flexible approach in examining the challenged legislation, of the kind undertaken by this Court in *Weber* and *Bullock.* As noted above, the common thread running through any elevated approach to the Equal Protection Clause is the elemental formula described somewhat crudely as a "less drastic means" requirement. In operation, such a requirement obliges Belle Terre to advance its interests in a manner which will not unnecessarily restrict constitutionally protected activity.

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[79] "Sometimes we just say the claim is 'invidious' and let the matter rest there, as Mr. Justice Stewart did, for example, in concurring in Frontiero. But at other times we sustain the discrimination, if it is justifiable on any conceivable rational basis, or strike it down, unless sustained by some compelling interest of the State, as, for example, when a State imposes a discrimination that burdens or penalizes the exercise of a constitutional right. See, e.g. Shapiro v. Thompson, 394 U S 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969). I am uncomfortable with the dichotomy, for it must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations." 93 S.Ct. at 2239-40.

C. *Measured Against the Requirements of the "Less Drastic Means" Principle, the Constitutional Invalidity of the Justifications Advanced by the Village in Support of the Ordinance Becomes Apparent.*

As demonstrated in Point IIIA, above, the Belle Terre ordinance impinges upon the fundamental constitutional rights of travel and privacy. Accordingly, it is appropriately subject to the requirement that it prove necessary to the promotion of a compelling state interest. And with the element of *necessity* comes the principle that it must be the constitutionally least drastic means of achieving the interest it purports to serve.

Even if this claim were to fail, the alternate, intermediate mode of review pursued in *Bullock* v. *Carter, supra, Weber* v. *Aetna Casualty & Surety Co., supra,* and *Police Department* v. *Mosley, supra,* is plainly applicable to the case at bar. The exclusion of persons from Belle Terre who wish to form households with persons to whom they are not related, substantially and adversely implicates their personal interests in free migration and settlement and in privacy. Even without resolving the question of whether the impact of the ordinance rises to the level of an impingement upon fundamental constitutional rights, this intermediate approach can and should be adopted.

The approach followed in *Bullock, Weber* and *Mosley* incorporates, to a significant extent, the principle of the less drastic means. Hence, whether the compelling state interest test or this alternate mode of review is adopted, the less drastic means inquiry is mandated.

When considered in terms of the less drastic means requirement, Belle Terre's assertions that the contested

ordinance regulates density, controls rents and reduces transiency are manifestly unpersuasive. Far from being reasonably necessary to the achievement of these ends, the ordinance is an extraordinarily oblique, inefficient and constitutionally odious means of pursuing these goals.

An indicated in Point II, the claim concerning population density ultimately reduces to the proposition that the ordinance lessens the likelihood of a very large household assuming residence in the Village. This concern, if it is genuine, could effectively, equitably and unobjectionably be addressed by an ordinance which placed reasonable restrictions upon the ratio of persons to bedrooms, or by some other direct restriction upon overcrowding.

The Village has also portrayed the density interest as encompassing the aim of reducing potential parking and traffic problems. Obviously, parking and traffic regulations constitute a far more direct method of addressing this concern, and one which does not have the side effect of excluding particular groups of people from the Village.

Likewise, the purported concern of the Village to limit escalating rents could be satisfied in a fashion which is at once greatly more effective and less intrusive upon the rights of Appellees and others like them. The enactment of rent controls would fully serve what the Village says its interest is, without trespassing upon the rights of travel and privacy.[80]

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[80] Appellants question whether the Village is empowered to adopt rent controls (Appellants' Brief at 35). If in fact the State has declined to delegate or has superseded the power of municipalities in this area, such an action suggests that the New York Legislature views problems of rental economics as matters of regional or statewide impact. See note 63, *supra*. This policy, as well as Appellants'

It is true that there may be no constitutionally less drastic means of advancing the Village's professed concern to exclude persons who are likely to leave in a relatively short time. The reason that no such alternative exists is twofold: first, as a practical matter, we live in a highly mobile society, and the forces which impel this circumstance are so diverse as to defeat any attempt to secure a community against the tide of mobility—even in a "tiny Village" like Belle Terre. And second, the exclusion of any class of persons on the ground that they may soon wish to leave the community is wholly inconsistent with the right to travel, so that the Village's alternatives in pursuit of this goal are all unconstitutional.

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contention that Belle Terre does not have "the kind of bureaucratic superstructure" necessary to administer a system of rent controls, suggests that it is utterly inappropriate for a tiny community to attempt to address problems of rental economics, including the problem of rental escalation the Village claims as its legitimate interest.

Moreover, Belle Terre's claim that it would be administratively inconvenient to undertake a program of rent control could not provide an excuse for failure to adopt a less drastic means. See *Reed* v. *Reed, supra,* 404 U.S. at 76; *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be affirmed, and the Building Zone Ordinance of the Village of Belle Terre, insofar as it proscribes residency by more than two persons not related by blood, adoption, or marriage, adjudged unconstitutional.

Respectfully submitted,

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